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No. 82-1042

In the Supreme Court of the United States

OCTOBER TERM, 1982

STEPHEN M. SUNDHEIMER, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in its conclusion that petitioner's guilty plea in a criminal tax case admitted activities constituting "transaction[s] * * * of the character of * * * accommodation trade[s]" in violation of the Commodity Exchange Act.

2. Whether the court of appeals erred in affirming the conclusion of the Commodity Futures Trading Commission that, under all the circumstances, petitioner's criminal guilty plea justified revocation of his registration as a commodities floor broker and the imposition of other administrative sanctions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 688 F.2d 150. The final opinion and order of the Commodity Futures Trading Commission is reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,245 (Sept. 16, 1981) and the Commission's subsequent opinion denying a petition for reconsideration is reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,270 (Oct. 16, 1981). The initial decision and order of the administrative law judge are reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,020 (Feb. 15, 1980) and incorporate an earlier decision and order reported at [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,855 (July 13, 1979).[1]

[1] The opinions of the Commission and the administrative law judge are attached as Appendices A, B, C, and D to this brief.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. A petition for rehearing was denied on October 21, 1982 (Pet. App. A9). The petition for a writ of certiorari was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 4c(a), 6(b), 6(c), 9, 8a(2) and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 6c(a), 9, 13b, 13, 12a(2) and 12a(3), are set forth at Pet. 3-10.

STATEMENT

On October 27, 1978, in the United States District Court for the Southern District of New York, petitioner pleaded guilty to a criminal information charging him with knowingly aiding, assisting and advising in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2) (Pet. App. A3). In pleading guilty to that felony, petitioner acknowledged that the tax fraud was accomplished through prearranged trades in crude oil futures contracts in which he had authorized his firm to participate (Pet. App. A3, A18).

On January 16, 1979, the Commodity Futures Trading Commission (CFTC) issued an administrative complaint pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 9, 13b and 12a(3), alleging that petitioner, a convicted felon, was unfit to remain registered with the Commission as a floor broker (Pet. App. A3).[2] In light of petitioner's admitted

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[2] See Section 2(a)(1) of the Act, 7 U.S.C. 2, for a definition of the term "floor broker," and Section 4e, 7 U.S.C. 6e, for the requirement that all floor brokers be registered with the CFTC.

participation in prearranged trades and manipulation of the prices of crude oil futures contracts, it was also alleged that petitioner had violated, or aided and abetted violations of, Section 4c(a)(A) of the Act, 7 U.S.C. 6c(a)(A), which *inter alia*, prohibits transactions "of the character of" accommodation trades, and Section 9(b) of the Act, 7 U.S.C. 13(b), which forbids market price manipulations. The complaint sought an order revoking petitioner's registration, assessing a civil penalty of up to $100,000 per violation, requiring petitioner to cease and desist from violating the Act, and barring him from trading on any commodity exchanges and requiring all exchanges to refuse him trading privileges (App. A, *infra*, 2a).

The CFTC's Division of Enforcement moved for summary disposition of all allegations of the complaint pursuant to Commission Rule 10.91, 17 C.F.R. 10.91. The Division argued that petitioner's felony plea and conviction estopped him from contesting allegations encompassed by the criminal information (Pet. App. A3-A4). The administrative law judge agreed (App. D, *infra*, 33a-54a). He held that the guilty plea created a prima facie case of unfitness, and that Sections 9(b) and 4c(a)(A) of the Act had been violated (Pet. App. A4). In reaching this determination, the administrative law judge found that petitioner's conduct in prearranging trades in crude oil futures contracts did not end prior to April 21, 1975, the date the Act became applicable to crude oil futures (*ibid.*). Accordingly, the administrative law judge granted in part the motion for summary disposition, but reserved judgment on the imposition of sanctions pending a hearing at which petitioner could present evidence of mitigating circumstances and rehabilitation (*ibid.*).

Following the hearing, the administrative law judge concluded that petitioner had presented insufficient evidence to show mitigation and rehabilitation (Pet. App.

A4; App. C, *infra*, 21a-32a). Accordingly, the administrative law judge suspended petitioner's registration as a floor broker for six months, suspended his trading privileges for two years, ordered him to cease and desist from further violations of the Act, and fined him $200,000 (Pet. App. A4).

On appeal, the CFTC affirmed the administrative law judge's finding that petitioner was unfit to remain registered because of his felony conviction. (App. A, *infra*, 10a). The Commission also held that the guilty plea estopped petitioner from denying his participation in a scheme involving the prearrangement of trades in commodity futures contracts after April 21, 1975, and that this conduct constituted a violation of Section 4c(a)(A) of the Act (App. A, *infra*, 9a). However, the commission vacated the administrative law judge's holding that petitioner had violated Section 9(b) of the Act, because the guilty plea did not encompass all the elements necessary to establish a *prima facie* case of market manipulation (App. A, *infra*, 9a-10a). The Commission determined that petitioner's registration should be revoked rather than suspended, reduced the civil penalty to $100,000, and affirmed the remaining sanctions (*id.* at 14a).

The court of appeals affirmed the Commission's opinion and order in all respects (Pet. App. A1-A8).

ARGUMENT

The decision of the court of appeals is correct and is in accord with decisions of this Court and other federal courts that have reviewed the imposition of administrative sanctions. None of the issues presented warrants further review by this Court.

1. Petitioner contends that the Commission exceeded its statutory power in finding that the crude oil futures transactions in question violated Section 4c(a)(A) because they were "tantamount to 'accommodation trades'" (App. A, *infra*, 9a n.9). Section 4c(a)(A), ex-

pressly prohibits transactions "of the character of," or "commonly known to the trade as" accommodation trades. Petitioner's assertion is that the Commission's use of a semantic variation of the statutory phrase constitutes an impermissibly expansive interpretation of the statute (Pet. 23-28).[3] In rejecting this argument and upholding the Commission's finding, the court of appeals, while admonishing the Commission to adhere more closely to the exact language of the Act, correctly concluded that the Commission equated the terms "tantamount to" and "of the character of" (Pet. App. A5).

2. Petitioner also contends that the futures transactions in issue were not of the character of accommodation trades because they were not fictitious, but were trades actually executed on the floor of a commodity exchange (Pet. 21-23). In addressing this argument, the Commission noted that while the prearranged trades were real in the sense that they brought about an actual change in the market position of the parties involved,

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[3] Petitioner attempts to analogize the Commission's holding that the crude oil futures transactions were tantamount to accommodation trades to the former practice of the Securities and Exchange Commission of issuing a series of 10-day orders suspending trading of stock that this Court invalidated in *SEC* v. *Sloan*, 436 U.S. 103 (1978) (Pet. 25-26). That case, however, involved an agency's attempt to fashion a remedy in a form that was contrary to a clear and precise statutory provision. 436 U.S. at 117-119. Here the statutory provision does not address the type of remedy to be employed but rather the parameters of unlawful conduct, which the statute defines in the broadest of terms.

Petitioner also suggests that the court of appeals' determination upholding the Commission's finding of accommodation trades is in conflict with the holdings of other courts of appeals (Pet. 26-27). However, the cases cited by petitioner to support this assertion merely recite general propositions to the effect that expansive interpretations of statutory standards by administrative agencies must be given careful judicial review. None of these cases concerns Section 4c(a) or any other provision of the Commodity Exchange Act.

they were nonetheless tantamount to accommodation trades prohibited by the Act (App. A, *infra*, 9a n.9). The Commission based this conclusion on its finding that these prearranged trades furnished "a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk" (*ibid.*). In approving the Commission's analysis, the court of appeals noted that "[i]t is this intent, the absence of good-faith, arms-length trading, and the undisclosed prearrangement for losses and gains, that demonstrates the 'accommodation' nature of the transactions in the instant case" (Pet. App. A6).

Petitioner also claims that the prohibition against accommodation trades in Section 4c(a) of the Act is unconstitutionally vague (Pet. 28-30). Petitioner notes (Pet. 29) that the term "accommodation trade" is not defined in the Act. The court of appeals nevertheless concluded that there is no constitutional ambiguity in defining accommodation trade as the Commission did here because such a description conforms with the practical, everyday meaning of the phrase (Pet. App. A6). See *Precious Metals Associates, Inc.* v. *CFTC*, 620 F.2d 900, 907 (1st Cir. 1980); *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482, 484-485 (2d Cir.), cert. denied, 434 U.S. 938 (1977). In addition, as the court of appeals recognized (Pet. App. A6), this everyday meaning is consistent with the prior administrative application of the term. See, *e.g.*, *In re Julian M. Marks*, 22 Agric. Dec. 761, 766-772 (1963); *In re Irwin M. Eisen*, 22 Agric. Dec. 758, 759 (1963); *In re Julian M. Marks*, 20 Agric. Dec. 457, 458-459 (1961).

3. Petitioner next contends that his due process rights were violated because the theory of the Commission's case and the violations of law with which he was charged were changed during the administrative process without first giving petitioner notice and affording

him an opportunity to oppose (Pet. 20-34). This contention has no basis in fact.

The Commission's conclusion that petitioner's conduct involved engaging in transactions tantamount to accommodation trades was based squarely on the administrative complaint that the transactions "'were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales * * *'" (App. A, *infra*, 1a n.1). The fact that the Commission did not sustain the administrative law judge's conclusion that petitioner had engaged in "fictitious" sales does not, therefore, establish that petitioner did not have adequate notice of the charges.

4. Petitioner asserts that ambiguities in his plea of guilty and pleading allocution made it improper for the Commission to conclude that petitioner had admitted engaging in prearranged trades after April 21, 1975, when the Act became applicable to trading in crude oil futures. In reaching this conclusion, which was specifically upheld by the court of appeals (Pet. App. A3-A5), the Commission was guided by this Court's opinion in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). See App. A, *infra*, 5a. In *Emich Motors*, the Court held that a party in a subsequent civil proceeding is "entitled to introduce [into evidence a] prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." 340 U.S. at 569. The Commission applied this standard and concluded that the administrative law judge, after making a careful examination of the record of the plea proceeding, had properly determined that petitioner's plea included an admission that prearrangement of trades continued after April 21, 1975 (App. A, *infra*, 7a-9a).

5. Finally, petitioner contends that in concluding that petitioner had not been rehabilitated, the Commission

improperly ignored the evidence of rehabilitation and instead made the passage of time the determinative factor in its decision (Pet. 39-40). In rejecting petitioner's evidence of rehabilitation, the Commission concluded that "[b]ecause of the gravity of respondent's violation of the Act, we believe that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred * * *" (Pet. App. A7; App. A, *infra*, 12a n.13). As the court of appeals recognized (Pet. App. A7), the passage of time is a relevant factor. Separate from this criterion, the Commission gave serious consideration to the evidence of rehabilitation (App. A, *infra*, 11a n.13), and its resulting determination was correctly upheld by the court of appeals (Pet. App. A8).[4] Although the court noted some concern with the Commission's choice of language, its review of the entire record led it to conclude that the sanctions imposed did not constitute an abuse of discretion (*ibid.*). The court also observed (*ibid.*) that "[p]etitioner may reapply * * * for registration. *Silverman* v. *Commodity Futures Trading Commission*, 562 F.2d 432, 439 (7th Cir. 1977). Should the Executive Director reject petitioner's application without giving him a further hearing on the question of rehabilitation, *see* 17 C.F.R. § 3.20(e)(f), or should the Commission fail to give petitioner a fair hearing accompanied by proper consideration of all the evidence, petitioner's claim of prejudice may then be viewed in a different light."

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[4] The administrative law judge had also seriously considered petitioner's evidence of rehabilitation (App. C, *infra*, 24a-28a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1983

APPENDIX A

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. 79-22
Stephen M. Sundheimer,	:	OPINION and ORDER
Respondent	:	

This proceeding was initiated on January 16, 1979 when a complaint was filed pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. §§9, 13, and 12a(3) (1976), alleging that Stephen M. Sundheimer had been convicted of aiding and abetting the filing of false tax returns in violation of 26 U.S.C. §7206(2), a felony, and hence was unfit to be registered as a floor broker. It was also alleged that respondent had violated Sections 4c(a) and 9(b) of the Act insofar as he had admitted to prearranging trades 1/ and manipulating prices of crude oil futures contracts traded on the New York Cotton Exchange, respectively, while pleading guilty to a criminal information charging him with such activities in connection with the filing of false tax returns. 2/

1/ None of the subsections of Section 4c(a) of the Act proscribe "prearranged trading" in haec verba. However, the Division of Enforcement in the complaint averred, inter alia, that respondent's prearranged transactions "were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales, or which were used to cause prices to be reported, registered, or recorded which were not true and bona fide prices, in order to create predetermined losses and gains in commodity futures accounts" (Complaint at 2). These allegations, if proven, would establish violations of Sections 4c(a)(A) and (C) of the Act. See note 9, infra.

2/ On October 27, 1978, respondent pleaded guilty to a criminal information charging him with aiding and abetting the filing of false tax

(footnote continued)

Based on the foregoing, the Division of Enforcement sought a cease and desist order; an order revoking respondent's registration as a floor broker; an order prohibiting Mr. Sundheimer from trading on or subject to the rules of any contract market; and a civil money penalty (Complaint at 3).

On March 19, 1979, respondent filed an answer admitting the guilty plea and conviction, but denying unfitness. Upon motion of the Division of Enforcement, Administrative Law Judge Robert E. Duncan partially granted summary disposition, finding that the Division of Enforcement had made a prima facie showing that Mr. Sundheimer is unfit to be registered as a floor broker by virtue of his felony tax conviction in federal district court and the underlying prearrangement of trades and price manipulation

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2/ (footnote continued)

returns in violation of 26 U.S.C. §7206(2). It was also charged in the information that respondent

> (on behalf of Pressner Trading Corporation, of which at all times relevant to this Information he was vice-president), together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years.

(Motion for Summary Disposition, Exhibit II, at 1.)

On January 9, 1979, the United States District Court for the Southern District of New York entered a judgment of conviction against respondent for "unlawfully, willfully and knowingly aid[ing], assist[ing] and advis[ing] in the preparation of false and fraudulent income tax returns (Title 26, United States Code, Section 7206(2))." (Motion for Summary Dispositions, Exhibit I). Respondent was thereupon sentenced to imprisonment for one year and was fined $5,000. This sentence was suspended and Mr. Sundheimer was placed on probation for one year with a special condition that he devote one year to some community activity on a full-time basis. In fulfillment of this condition, respondent served as a technical assistant full-time with the Bureau of Environmental Protection of the New York State Attorney General's office for one year without pay.

in crude oil futures (Order Granting Summary Disposition at 16).[3] Moreover, the judge found that because of admissions made during his guilty plea for the filing of false tax returns the doctrine of collateral estoppel precluded respondent from denying that he violated Sections 4c(a) and 9(b) of the Act. Id., at 15.[4] However, respondent was afforded an opportunity to offer

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3/ The Administrative Law Judge also granted summary disposition as to whether respondent's activities involving manipulation and pre-arranged trading postdated April 21, 1975, the date upon which the Act was made applicable to crude oil and whether Section 9(b) — which provides criminal penalties for manipulation, a felony under that section — can be the basis for civil sanctions imposed under the Act. (Order Granting Summary Disposition, at 2-3.) The judge resolved all of these questions affirmatively.

4/ In this regard, the Administrative Law Judge stated:

> Respondent contends that any collateral estoppel pertaining to his conviction is limited to his crime and his 'crime was that he aided and abetted the filing of a false tax return in 1974 and in admitting his guilt he did not admit to all of the matters charged in the information.' The record, however, does not support this contention. At the hearing before the District Court on October 27, 1978, Respondent without reservation pleaded guilty to all the facts charged in the Information, supra at paragraph 6. Respondent correctly argues that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U.S. 558, 568-569 (1951). Where there is a guilty plea the truth of the averments in the information is admitted. United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Judge Holloway, concurring in the result). (Order Granting Summary Disposition, at 15.)

The judge thereupon concluded that respondent was collaterally estopped from denying that he engaged in fictitious sales and manipulation in violation of the Act. (Order Granting Summary Disposition, at 14.)

evidence on the issues of mitigation and rehabilitation at an oral hearing held on July 25, 26 and 27, 1979, in New York, New York, at which time sixteen witnesses, in addition to respondent, testified on these questions.

On February 15, 1980, the Administrative Law Judge filed an initial decision in which he found that the evidence of mitigation presented by respondent was insufficient to offset the gravity of his violations of the Act. He also found that the evidence presented by Mr. Sundheimer did not establish that Mr. Sundheimer was sufficiently rehabilitated to permit registration or to conclude that sanctions under the Act would be unwarranted. Accordingly, the judge ordered Mr. Sundheimer to cease and desist from further violations of Sections 4c(a) and 9(b) of the Act; suspended his registration as a floor broker for six months; prohibited him from trading on or subject to the rules of any contract market for twenty-four months; and assessed Mr. Sundheimer a civil money penalty in the amount of $200,000.

Respondent has appealed to the Commission, challenging the judge's findings that he violated the Act, as well as the severity of the sanctions imposed against him. The Division has cross-appealed arguing that Mr. Sundheimer's registration as a floor broker should be revoked, not merely suspended. After consideration of the record and all of the issues raised and briefed by the parties on appeal, we have determined to affirm the determination of unfitness made by the Administrative Law Judge.

I.

In our view, Stephen M. Sundheimer is unfit to be registered with the Commission because of his felony conviction and because the admissions which respondent made in pleading guilty establish that he violated Section 4c(a)(A).

of the Act.[5/] We hold also that Mr. Sundheimer is estopped from disputing the factual bases for this conclusion. However, we have also determined that the mere use of the word "manipulated" in the criminal information without more specific detail does not establish that respondent actually manipulated the crude oil market as prohibited by Section 9(b) of the Act.

In deciding whether the ultimate judgment of guilt in respondent's earlier criminal case has any collateral estoppel effect in this proceeding, the Supreme Court's opinion in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951), is instructive. In Emich Motors, the Court ruled that a party in a subsequent civil proceeding "is entitled to introduce [into evidence a] prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." 340 U.S., at 569 (emphasis added). Noting that there may be a difficulty in determining "what matters were adjudicated in the antecedent suit," id., the Court indicated that trial judges in future cases must "examine the record of the antecedent case to determine the issues decided by the judgment." 340 U.S., at 572. We are satisfied that the Administrative Law Judge in accordance with Emich Motors conducted an examination of the record of the respondent's guilty plea proceeding to ascertain what matters were necessarily decided by that proceeding.

It is worth noting here that a knowing and voluntary plea of guilty to a criminal charge constitutes an admission of all the material facts alleged in the indictment or information, see, e.g., McCarthy v. United States, 394 U.S. 459, 466 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927); United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). In the

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5/ See note 9, infra.

earlier proceeding, Mr. Sundheimer entered a plea of guilty to a criminal information charging him with filing false tax returns by fraudulently prearranging trades and manipulating prices of crude oil futures. Although respondent was ultimately convicted of the tax offense only, our examination of the record leads us likewise to the conclusion that the information was sufficiently specific and respondent's prearrangement of trades was so integrally related with his tax offense that all the activities specified in the information, including those which constituted violations of the Act, were "necessarily decided" as the factual basis for his plea of guilty to the tax offense.[6/]

6/ When the guilty plea was taken in district court, Mr. Sundheimer was questioned by the court concerning the circumstances upon which the plea was based:

[By the Court:] Q. Mr. Sundheimer, I want you, in your own words, to tell me just what it is that you did that is the foundation for your decision to plead guilty to the information.

[By Respondent:] A. Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.

I gave my consent to that arrangement and I was present when it was made.

Q. And your consent was necessary to the making of that arrangement?

A. Yes, it was, your Honor.

(footnote continued)

It is on this basis that we disagree with Mr. Sundheimer that, notwithstanding his plea of guilty to all matters alleged in the information, he did not admit that the prearranged trades occurred on or after April 21, 1975. He argues on appeal that "there is simply no evidence [in the record] that respondent engaged in unlawful conduct in [sic] or after April 21, 1975" the date on which the Commodity Exchange Act was made applicable to crude oil futures (Respondent's Brief at 26).

As mentioned previously, the criminal information to which respondent pled guilty charged him with "creating predetermined losses . . . for the

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6/ (footnote continued)

Q. And did you understand that the purpose of that arrangement was to enable the oil company to take certain tax losses on its corporate tax return?

A. Yes, I did, your Honor.

Q. And did you also then give your consent to a similar arrangement for the following year?

A. I think that it was implicit in the initial understanding. There was no additional consent required.

Q. Are you in good health today, Mr. Sundheimer?

A. I hope so.

[By the Court:] Very well, gentlemen. I shall accept the plea. (Order Granting Summary Disposition In Part, Exhibit III, at 9-11.)

Furthermore, Stephen Sundheimer was questioned by the court:

Q. On an information filed this day, October 27, 1978, how do you plead to this information?

A. I plead guilty, sir.

(Id. at 11.)

fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following fiscal years" (Motion for Summary Disposition, Exhibit II, at 2; emphasis added). Given the nature of straddles intended to result in a tax benefit, a "gain" transaction in "the following fiscal year" necessarily requires trading activity within that year.[7] It therefore follows from the quoted language that respondent's unlawful activities and consent carried into the fiscal year commencing November 1, 1975 and ending October 31, 1976—the fiscal year following that ending October 31, 1975—and, thus, after the date on which the Act became applicable to trading in crude oil futures.[8] On that basis, we conclude that respondent is also estopped from denying his participation in a scheme involving the prearrangement of commodity

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7/ In typical commodity straddle transactions that are intended primarily for tax benefit, a trader buys and sells an equal number of contracts of a commodity in different delivery months. It is hoped that any market price movement will result in a loss on one side, or leg, of the straddle and a gain of a roughly equivalent amount on the other leg. The trader then seeks to liquidate the losing side in the present tax year, as pertinent here, the year ending October 31, 1975. If successful, the trader then claims a loss in that accounting period, while the other leg of the straddle, the one showing a profit, is not intended to be liquidated until the following tax year, in this case the year ending October 31, 1976. This is designed effectively to shift what might otherwise be taxable income from one year to the next.

8/ Mr. Sundheimer's testimony at the guilty plea proceeding, the relevant portion of which is set forth in note 6, supra, is not inconsistent with this conclusion. Respondent explained to the court that "sometime in the fall of 1974" he authorized prearranged trades which "ultimately" — meaning the following year as respondent was speaking about tax straddles — enabled an oil company to obtain tax benefits. He further testified that he consented implicitly to a similar arrangement for the following year, i.e., respondent authorized additional prearranged transactions which enabled an oil company to take losses in that year — fiscal 1975 — and ultimately to obtain tax gains in the following year — or fiscal 1976. Further, Count I of the information specified that Mr. Sundheimer's assistance in the tax fraud scheme extended until July 19, 1976.

futures transactions after April 21, 1975 and that this constituted a violation of Section 4c(a)(A) of the Act.[9/]

Turning then to the second count of the administrative complaint, the Commission is not persuaded that a guilty plea to a criminal information charging merely that respondent "manipulated the movement of prices on the Crude Oil Market" in the context of a false tax return case prosecuted by the Department of Justice necessarily establishes all the elements of a market manipulation as proscribed by the Commodity Exchange Act. To be sure, the "methods and techniques of manipulation are limited only by the ingenuity of man." Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972). Nevertheless, while the prearranged transactions were necessarily a part of respondent's overall tax evasion scheme, it does not follow that the transactions resulted in a market manipulation.[10/] Since there is an inadequate basis in this record

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9/ Section 4c(a)(A) prohibits persons from engaging in transactions involving any commodity: "if such transaction is, is of the character, or is commonly known to the trade as a 'wash sale', 'cross trade,' 'accommodation trade', or is a fictitious sale." Insofar as the prearranged transactions to which Mr. Sundheimer admitted were real trades, that is, they brought about an actual change in market position between respondent's company and the oil company, see Tr. — 379-80, they did not constitute "fictitious sales" as proscribed by Section 4c(a)(A). Therefore, the judge's conclusion in this regard is vacated. However, respondent's prearranged transactions did furnish the oil company with a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk, and to that extent, they were tantamount to "accommodation trades" which are also prohibited by Section 4c(a)(A) of the Act.

10/ Without purporting to delimit the parameters of manipulation, we would note that, in general, the elements of the offense include a person's ability to affect price levels or trends in the affected contract and market, the intentional exercise of that power, and an effect on price resulting from that exercise.

to support a conclusion that the activities of Mr. Sundheimer in fact caused a manipulation, we conclude that the Administrative Law Judge erred in his assessment that the Division established prima facie that respondent violated Section 9(b) of the Act and we vacate his holding in that regard.[11/]

II.

As noted above, the Division has cross-appealed challenging the judge's order merely to suspend Mr. Sundheimer's registration as a floor broker, arguing that it should be revoked. Mr. Sundheimer has endeavored to persuade us that we should not do so. We agree with the Division.[12/]

By virtue of Section 8a(3) of the Act, the Commission is empowered to revoke the registration of a person who has committed a felony. Therefore, Mr. Sundheimer's conviction for the filing of false tax returns, a felony, justifies revocation of his registration. See 7 U.S.C. §12a(2)(B) as incorporated in §12a(3). And we have also concluded that Mr. Sundheimer engaged in prearranging trades in the crude oil market. This conduct constitutes a serious violation of the Commodity Exchange Act.

11/ We wish to emphasize that this conclusion is based on the record as it exists herein. The only evidence produced by the Division of Enforcement was the criminal information and the testimony of Stephen Sundheimer at his guilty plea proceeding. Nothing in this decision should be construed to mean that the Commission has analyzed the facts and circumstances underlying respondent's guilty plea and testimony or the conduct of other persons involved with Mr. Sundheimer in his tax fraud scheme. Further, we do not mean to suggest that a guilty plea in other circumstances might not bare sufficient detail to establish a market manipulation in the full measure of proof required under the Commodity Exchange Act.

12/ An administrative agency may increase a sanction beyond that imposed by an administrative law judge. Fink v. Securities and Exchange Commission, 417 F.2d 1058, 1059 (2d Cir. 1969); Hanly v. Securities and Exchange Commission, 415 F.2d 591, 599 (2d Cir. 1969). See Silverman v. Commodity Futures Trading Commission, 562 F.2d 432, 438 (7th Cir. 1977).

Moreover, as a floor broker, Mr. Sundheimer's participation in prearranged trading, apart from being a violation of law, breached the duty that commodity professionals owe, not only to the futures market but also to those who rely upon their bona fides. We believe that it is our trust to assure beyond all question that "the highest ethical standards prevail" in every facet of the commodity futures industry and that breaches of those standards must be answered in kind. Cf. Commodity Futures Trading Commission v. J.S. Love & Associates Options, Ltd., 422 F. Supp. 652, 659 (S.D.N.Y. 1976). And "Congress invested the Commission with revocation power to safeguard the public interest in the well being of the nation's commodity futures markets." Silverman v. Commodity Futures Trading Commission, 562 F.2d 432, 439 (7th Cir. 1977).[13/] To insure against such conduct in the

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13/ In In the Matter of Carl M. Tipton, Jr., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,673 (September 22, 1978), aff'd mem., No. 78-3581 (6th Cir. Oct. 3, 1980), at 22,750, we stated

> although the burden of producing a sufficient quantum of evidence to establish prima facie unfitness initially is on the Division, the ultimate burden — the burden of persuading the Commission that he is not unfit for registration — is squarely on the applicant once the prima facie showing has been made.

Upon consideration of Mr. Sundheimer's proffered evidence of rehabilitation and mitigation, and in light of his past misconduct, the Commission is not persuaded that Mr. Sundheimer's continued registration would present no substantial risk to the marketplace. Cf. In the Matter of Claus-Peter F. Schreiber, CFTC Docket No. 78-8 (Commission Order filed March 17, 1981). The Commission is not insensitive to the fact that respondent has already performed one year of full-time community service in lieu of imprisonment for the same duration. See n. 2, supra. But this was nothing more than payment of the debt owed as the result of respondent's felony tax conviction, which involves different policy considerations and a different social purpose. And Mr. Sundheimer's proffered evidence of rehabilitation

(footnote continued)

future and to serve as a warning to others, we conclude that the public interest policies of the Act can best be served by revocation, not merely suspension, of Mr. Sundheimer's registration as a floor broker.

We also find the twenty-four month suspension of respondent's trading privileges to be particulary appropriate. It is apparent that the unlawful trading activity was carried out with Mr. Sundheimer's authorization for the benefit of his own company. This conduct, while not causing injury to customers, as far as the record shows, was a serious violation and a direct abuse of his market trading privileges. A denial of those privileges will serve as a signal to others and to protect the market at least for the period of the trading prohibition. Cf. Haltmier v. Commodity Futures Trading Commission, 554 F.2d 556, 564 (2d Cir. 1977).

Finally, in furtherance of the remedial policies of the Commodity Exchange Act and to deter others in the industry from committing similar violations of the Act, we find it necessary to impose a civil money penalty

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13/ (footnote continued)

has received serious consideration by the Commission. However, in Tipton, supra, at 22,750, we stated that

> the applicant's failure to persuade the Commission that the public interest will not be disserved by his registration will be fatal to his application. Indeed, if the Commission, after considering the evidence offered by the applicant, retains any doubt as to whether or not the public interest dictates a refusal of registration, the applicant will not be registered.

Because of the gravity of respondent's violation of the Act, we believe that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred such that registration poses no unreasonable risks to the commodity futures markets and to the public.

against Mr. Sundheimer.[14/] In determining the amount of such penalty, we have focused primarily upon the gravity of respondent's violation, that is, his participation with others for the purpose of financial gain in prearranging the trades, the deliberate intent on the part of respondent and the fact that respondent's participation in the prearranged trading scheme continued for at least two years. All reflect to respondent's detriment in our consideration of the gravity of his violation. The Administrative Law Judge found Mr. Sundheimer's net assets to be worth more than $1,000,000. (Initial Decision, at 11.) While respondent complains that most of those assets are illiquid,[15/] he does not challenge the judge's computation of his net worth. Since this offense is nearly as egregious as market

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14/ See Section 6(d) of the Act.

15/ Respondent has also raised the argument that the Administrative Law Judge's assessment of a civil money penalty must be set aside because the judge failed to consider that most of his assets are not liquid and thus not readily available for the payment of a fine. We consider this argument to be frivolous; there is no basis in law to conclude that the nature of a respondent's assets requires the government to stay its hand in imposing a monetary sanction.

The Administrative Law Judge considered Mr. Sundheimer's ability to continue in business in determining the amount of the penalty, and found his net assets to be a relevant factor in figuring respondent's ability to continue in business (Initial Decision at 11). Respondent argues that because it was established that he is a person "whose primary business involves the use of the commodity futures markets," under Section 6(d) of the Act, it was error for the judge to consider his net assets or net worth as factors in assessing the amount of the penalty (Respondent's Brief, at 47).

We have a slightly different view, given our determination to revoke Mr. Sundheimer's registration. We have made the ultimate determination that Mr. Sundheimer is unfit to "continue in business on the basis of his present registration." Therefore, while that factor must be considered by the Commission where a termination of registered status is not contemplated or where the respondent's business activities did not require registration, consideration of respondent's ability to continue in business has become moot under the circumstances presented here. Moreover, the net worth of respondent to the extent that standard is applicable here, is more than sufficient to sustain the civil money penalty imposed here.

manipulation, the gravest offense under the Act, a civil money penalty of $100,000 is appropriate here. Accordingly, the $200,000 penalty imposed upon Mr. Sundheimer by the Administrative Law Judge is remitted to that amount. 16/

Upon consideration of the record as a whole, all arguments raised and briefed by the respondent on appeal and in accordance with a preponderance of reliable, probative and substantial evidence, IT IS ORDERED that the registration of Stephen M. Sundheimer as a floor broker is HEREBY REVOKED. IT IS FURTHER ORDERED that respondent cease and desist from further violations of Sections 4c(a)(A) of the Act; that respondent be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four months. Respondent is also ordered to pay a civil money penalty in the amount of $100,000 within thirty days of notice of this order.

By the Commission (Chairman JOHNSON and Commissioners DUNN, GARTNER and STONE).

Jane K. Stuckey
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 16, 1981

16/ Under Section 6(d) of the Act, the Commission is empowered to impose a civil monetary penalty against a respondent who has violated the Act up to $100,000 per violation. The Administrative Law Judge's imposition of a penalty in the amount of $200,000 against respondent was based in part on his conclusion that Mr. Sundheimer had violated both Sections 4c(a) and 9(b) of the Act. See Initial Decision at 10-11. Because we have vacated the judge's determination that respondent engaged in manipulation, the $100,000 assessed for this offense is required to be withdrawn under Section 6(d) of the Act.

APPENDIX B

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

CFTC
OFFICE OF
HEARING CLERK
Oct 16 9 35 AM '81

In the Matter of	
Stephen M. Sundheimer,	CFTC Docket No. 79-22
Respondent	ORDER

On September 16, 1981, the Commission issued its final opinion and order in the above-captioned proceeding in which it determined that respondent Stephen M. Sundheimer was unfit for continued registration because he had been convicted of filing false tax returns in violation of 26 U.S.C. §7206(2), a felony. The Commission also determined that Mr. Sundheimer participated in a prearranged crude oil futures trading scheme in violation of Section 4c(a)(A) of the Commodity Exchange Act, as amended, 7 U.S.C. §6c(a)(A) (1976). On those bases, the Commission revoked Mr. Sundheimer's registration as a floor broker, ordered respondent to cease and desist from further violations of Section 4c(a)(A) of the Act, ordered that respondent be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four months, and assessed a civil money penalty of $100,000 against Mr. Sundheimer.

On October 1, 1981, Mr. Sundheimer filed a "petition for reconsideration" of the Commission's September 16 opinion and order. Respondent also filed on that date a motion for a stay of the Commission's opinion and order "pending determination of the petition for reconsideration and of the appeal of that order to the United States Court of Appeals for the Second Circuit."[1/]

1/ On October 1, 1981, respondent also filed a notice of appeal of the Commission's opinion and order in the United States Court of Appeal for the Second Circuit. Mr. Sundheimer sets forth his grounds for appeal at the end of his petition for reconsideration.

On October 8, 1981, the Division of Enforcement filed responses opposing both the petition for reconsideration and the motion for a stay.

The standard against which respondent's petition for reconsideration must be judged is Commission Regulation 10.106, 17 C.F.R. §10.106 (1981) which provides that "[a]ny petition filed under this subsection must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission." In our view, respondent's petition does not meet this standard, and, therefore, should be denied. In addition, we believe that inasmuch Mr. Sundheimer's motion for a stay articulates no adequate justification for the Commission granting a stay, it should likewise be denied.

In his petition, Mr. Sundheimer sets forth several criteria as bases for reconsideration by the Commission of its opinion and order. None of those criteria pose "new questions raised by the opinion and order" about which he did not previously have an opportunity to argue before the Commission. Foremost among what might be considered "new" matters raised by respondent[2/] as a basis for reconsideration is his argument that the Commission has not considered the passage of time since the July 1979 hearing as evidence of rehabilitation. To that end, Mr. Sundheimer argues that the absence of "any complaint by any member of the public, any member of any exchange, or any enforcement agencies" constitutes new and additional evidence of his rehabilitation. (Petition, at 3.) Another new matter raised by respondent is his averment that his company, Pressner Trading Company, voluntarily dis-

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2/ Although these may be considered new matters raised by respondent at this juncture, they are not "new questions raised by the opinion and order and concerning which the petitioner had not opportunity to argue before the Commission." Commission Regulation 10.106.

continued its operations as a futures commission merchant in order to preserve the positive image of the futures industry, because several of the company's officers had been under criminal indictment. (Petition, at 11-12.)

Mr. Sundheimer's first "new" matter presupposes that the Commission failed to consider the complete passage of time that has elapsed since his participation in the prearranged trading scheme in arriving at its determination that respondent was insufficiently rehabilitated. However, it has only been within the past few weeks that the Commission has actually considered whether Mr. Sundheimer was rehabilitated, and it was concluded that "rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred such that registration poses no unreasonable risks to the commodity futures markets and to the public." Opinion and Order, at 12 n. 13. It was presumed at that time that Mr. Sundheimer had obeyed the law — as he was required to do — between July 1979 and Commission consideration. Thus, respondent's argument provides no basis for reconsideration.

Respondent's other "new" matter raised concerns a voluntary discontinuance by Pressner Trading Company of its operations as a futures commission merchant to preserve the positive image of the futures industry. While this matter may be viewed as a commendable gesture, it is not pivotal on the issue of whether the public interest dictates that sanctions be imposed against respondent. Mr. Sundheimer's illegal conduct was an abuse of the commodity futures markets and his license as a floor broker, irrespective of any involvement of Pressner Trading Company in its capacity, or role, as a futures commission merchant. While discontinuance of Pressner's operations

as a futures commission merchant may foreclose an avenue by which respondent may commit unlawful activity, only revocation of respondent's individual registration as a floor broker and a prohibition of his trading privileges will ensure that further opportunities for abuse of the markets on his part are foreclosed. As the Commission recognized in its opinion and order, the cease and desist order and the civil money penalty are necessary to protect the public interest and to deter respondent and others in the industry from committing similar violations of the Act in the future.

The other questions raised by respondent's petition cannot be considered "new." Mr. Sundheimer previously had the opportunity to argue all such questions before the Commission, and the Commission, in fact, addressed most of them in its opinion and order.[3/] Accordingly, we have concluded that respondent's petition for reconsideration fails to satisfy the standard enunciated in Commission Regulation 10.106, and on that basis, the Commission HEREBY ORDERS that Mr. Sundheimer's petition for reconsideration is DENIED.

3/ The other matters raised by respondent which cannot be considered to raise "new questions" are: that the Commission failed to appreciate fully respondent's proferred evidence of rehabilitation and mitigation (Petition, at 8-9); that the unlawful prearranged crude oil futures trades were not executed by Mr. Sundheimer personally (Petition, at 4); that it was implicit that respondent's participation in the prearranged crude oil futures trading scheme terminated before April 21, 1975, the date upon which the Commodity Exchange Act became applicable to crude oil futures (Petition, at 7); and , finally, that respondent's economic livelihood derives solely from his ability to trade in commodity futures, and he has no other business experience from which to earn a living (Petition, at 11).

In a footnote, Mr. Sundheimer also complains that he received harsher sanctions than an "active participant" in the same prearranged trading

(footnote continued)

As mentioned earlier, Mr. Sundheimer has also filed a motion for a stay of the Commission's opinion and order "pending determination of the petition for reconsideration and of the appeal of that order to the United States Court of Appeal for the Second Circuit." Respondent has not proffered any other justification for a stay beyond the motion for reconsideration which we have just considered and denied. Under the circumstances, we are not persuaded that the public interest will best be served other than by applying the sanctions ordered against Mr. Sundheimer at the earliest possible

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3/ (footnote continued)

scheme. See Petition, at 6. Respondent is referring to a Mr. Jules Nordlicht, secretary-treasurer of Pressner Trading Company during the relevant time period. Nordlicht was named as a respondent in a separate Commission proceeding. That proceeding was resolved by way of summary disposition wherein the Administrative Law Judge concluded that Mr. Nordlicht, inter alia, had engaged in "fictitious sales" in violation of Section 4c(a) of the Act, 7 U.S.C. §6c(a) (1976), and that he intentionally manipulated the crude oil futures markets, in violation of Section 9(b) of the Act, 7 U.S.C. §13(b) (1976). In the Matter of Jules Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (February 14, 1980). Prior to a hearing on sanctions, however, Mr. Nordlicht entered into a settlement agreeing to revocation of his registration. (The settlement order also provided that in two years, Mr. Nordlicht may reapply for registration and that nothing in the complaint or in the order granting summary disposition in his case could be used as the sole basis for the denial of his registration.) Mr. Nordlicht also agreed to a $75,000 civil money penalty, a cease and desist order, and a three month prohibition from trading.

To the extent that Mr. Sundheimer by this complaint is suggesting that the Commission has discriminated against him concerning the imposition of sanctions, suffice it to say that the Commission determines the propriety of sanctions to be meted against individual respondents on a case-by-case basis, not with a view toward other respondents in other proceedings. That the Commission has entered into a settlement concerning sanctions against another respondent in a separate, although similar, proceeding in no way limits the discretion of the Commission to impose the type of sanctions it deems appropriate against respondent in this proceeding. And there is no requirement under the Act or the Administrative Procedure Act for absolute uniformity of sanctions for similar violations. See Butz v. Glover Livestock Commission Company, Inc., 411 U.S. 182, 186-187 (1973); Kent v. Hardin, 425 U.S. 1346, 1349-50 (5th Cir. 1970).

ment. Therefore, the Commission HEREBY ORDERS that respondent's motion for a stay is DENIED. 1/

By the Commission (Chairman JOHNSON and Commissioners DUNN, GARDNER and STONE).

Jean A. Webb
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 16, 1981

1/ On October 8, 1981, the Division filed a motion to amend the opinion and order in this proceeding to clarify the effect of the Commission's order prohibiting Mr. Sundheimer from trading and to specify the effective date of the other sanctions. The Commission's order was effective upon notice, although the civil money penalty must be paid within thirty days thereafter. Accordingly, except for liquidation of positions open as of that time, respondent was barred from trading and all contract markets were required to refuse respondent trading privileges upon notice of the Commission's September 16, 1981 opinion and order.

APPENDIX C

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W.
Washington, D.C. 20581

In the Matter of :

STEPHEN M. SUNDHEIMER, : CFTC Docket No. 79-22

Respondent :

VINCENT L. MORGAN, Esquire
DONALD R. LEVINE, Esquire
Division of Enforcement
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D. C. 20581
For the Division of Enforcement

JULIUS BERMAN, Esquire
VINCENT J. SYRACUSE, Esquire
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N. Y. 10022
For the Respondent

Before: ROBERT E. DUNCAN
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

On July 13, 1979, a Decision and Order was issued in this administrative proceeding brought against Stephen M. Sundheimer, Respondent, a registered floor broker, granting, in part, summary disposition and determining that (1) a sufficient showing had been made by the Division of Enforcement that Respondent, because of his felony conviction and because of his manipulation of futures prices and fictitious sales of futures contracts in violation of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq. ("Act") -- in the absence of vitiating or countervailing evidence -- is unfit to remain registered as a floor broker, (2) Respondent's manipulation of futures prices and fictitious sales of futures contracts occurred after the effective date of the 1974 amendment to the Act and are within the jurisdiction of the Commission and (3) Respondent's manipulation of futures prices in violation of Section 9(b) of the Act provided a basis for the imposition of sanctions in an administrative proceeding. It was further determined that an evidentiary hearing should be afforded the parties for the purpose of offering evidence on the issues of mitigation, rehabilitation and the appropriateness of the application of any sanctions pursuant to the provisions of the Act. The hearing for this purpose was held on July 25, July 26 and July 27, 1979, in New York, N. Y. The parties were afforded full opportunity to be heard, adduce evidence, call, examine and cross-examine witnesses, submit oral argument and file proposed findings and conclusions.

Issues

The issues remaining for consideration and decision in this case are the following (Tr. 40-A, 41):

I. Whether Respondent has established that there are mitigating facts pertinent to his violations of the Act.

II. Whether Respondent has established facts showing his rehabilitation.

III. Whether, based upon Respondent's violations of the Act and the evidence of record, sanctions should be imposed against Respondent pursuant to the provisions of the Act.

Based upon the entire record, including the exhibits and testimony adduced and from my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact and Conclusions of Law

1. On July 13, 1979, after consideration of a motion filed by the Division of Enforcement, an opposition thereto by Respondent and supporting papers and arguments by the parties, an Order granting partial summary disposition was issued in this case. It was determined therein that on January 9, 1979, Respondent was convicted of a felony in Federal Court and that Respondent acted with others between September 1974 and July 19, 1976, in fixing, rigging and fraudulently prearranging trades and manipulating prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses. Respondent intentionally and willfully engaged in fictitious sales in violation of the Act and in price manipulation of futures contracts which resulted in artificial prices in violation of the Act.

2. Because the hearing held on July 25, July 26, and July 27, 1979, arguably interjects additional considerations concerning the nature and character of the violations, a re-evaluation of the allegations of the amended complaint in the context of the record as supplemented by the evidence adduced at the hearing has been made. Upon such re-evaluation, the Findings and Conclusions stated in the July 13, 1979 Decision and Order continue to be findings and conclusions in this case and are adopted and confirmed as a part of the Findings and Conclusions in this Initial Decision and Order.

I. The evidence of mitigation in the record fails to establish that the facts and circumstances of the violations alter or alleviate the seriousness and gravity of the violations.

3. As noted, supra, the Division of Enforcement has established a prima facie case of Respondent's willful violations of the Act. In such circumstances, it is Respondent's "burden to go forward to persuade" that sanctions contained in the Act should not be applied, Silverman v. Commodity Futures

Trading Commission, 562 F.2d 432, 438 (7th Cir. 1977); Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977). The evidence submitted at the July 1979 hearing concerning mitigation or extenuating circumstances was fragmentary and insubstantial. Respondent testified and called 16 witnesses who testified in support of his contentions. Respondent stated that his plea of guilty to the criminal charge of aiding and abetting the filing of false tax returns followed discussions between Respondent, Respondent's attorney and Government prosecutors (Tr. 355). Respondent testified that the reason he pled guilty was (Tr. 356-357):

> I came to realize that I was guilty. I was guilty of the crime that I pled guilty to. I don't think I was really guilty of the crime the very first day that I committed the crime.
>
> * * *
>
> I learned it later, and when I knew it I felt that it was wise to own up to it. I wasn't going to run away from it.

Respondent further testified that his involvement in the fictitious sales and price manipulation of futures contracts which resulted in the criminal charge began in 1974 and that he consented to the transactions. As a vice-president of Pressner Trading Corp., his consent to the arrangement was necessary (Tr. 372-373). The arrangement was a "tax straddle" and "it was completed in 1975" (Tr. 383). Respondent testified (Tr. 379-380):

> [C]ertainly the initial transaction was prearranged, but I had a great deal of skepticism whether or not in the end there could be successful prearrangement of the offset because -- but, in any case, it did come out that way, yes.
>
> * * *
>
> When we put the trades on initially we insisted they be of a character of what is known as 'butterfly spreads', which affords a greater degree of protection against peculiar market movements in connection with differences, price differences. Butterfly you would have -- the structure of the transaction affords certain protection.

> We felt that the butterfly spread was our insurance that in case something happened to the prearrangement * * *.

Respondent's testimony reflects a deliberate and knowledgeable action on his part with careful attention to the mechanics of the trading to protect against the positions going awry. Nothing in Respondent's testimony suggests that extraordinary circumstances existed at the time of the challenged transactions, compelling Respondent's actions resulting in Respondent's violations of the Act. Respondent's reasons for the activities found to be violative of the Act were to acquire financial gain (See Tr. 388). I have carefully reviewed the record for convincing evidence of extenuating or mitigating circumstances, and I find and conclude that there is no such evidence attendant to the transactions constituting violations of the Act.

4. Respondent relies upon testimony by Mitchell F. Baumeister, an Assistant District Attorney who was in charge of the investigation on behalf of the State of New York into trading activities on the crude oil futures market of the New York Cotton Exchange. The evidence collected by the investigation was submitted to Federal authorities in New York and Mr. Baumeister was asked to become a Special Assistant United States Attorney and to assist in the further preparation of the cases. He participated in the trial of indictments resulting from the investigation of the crude oil futures market (Tr. 115-116). In furtherance of his duties, Mr. Baumeister had several meetings with Respondent and was present when Respondent testified at the trial of the indictments. His testimony, according to Mr. Baumeister, showed Respondent's "minimal involvement" in the criminal activity concerning the crude oil futures market (Tr. 119-121). Mr. Baumeister did not explain the basis for his assessment that Respondent had only minimal involvement. The record contains no information which can be used to compare or contrast Respondent's actions with the actions of other participants. Respondent's testimony that his agreement was essential to the conduct of the unlawful activities (Tr. 372-373) sharply conflicts with Mr. Baumeister's conclusion that Respondent's involvement was minimal. The testimony of John M. Burns III, Esquire, is also relied upon to show mitigating circumstances (Resp. Brief, pp. 47-48). Mr. Burns was formerly an Executive Assistant United States Attorney for the Southern District of New York and is now practicing law in New York. Mr. Burns stated (Tr. 280-281):

BY MR. MORGAN:

Q. Going back to the nature of Mr. Sundheimer's conviction, are you aware of what he was convicted of?

A. Yes.

Q. What was it?

A. Well, he was convicted to a very limited part of the charges against him. In fact, I discussed with him, prior to his plea of guilty, whether or not he should do it and I was impressed that the plea of guilty would only be -- and I knew this as a U. S. Attorney, a former Executive Assistant -- that the plea was limited to what the plea was to, not to the entire amount of charges. He was pleading only to aiding and abetting the filing of a false return which reflected a rigging of prices, as I recall it, and that he was not pleading guilty to anything else and they were going to let those charges fall into abeyance. I knew at the time essentially that -- what he was pleading guilty to. I had a hunch he could have won the case because he hadn't aided and abetted; he's only condoned. But the fact that condonation, as opposed to aiding and abetting, is such a narrow line and it was affecting him so much because he's the kind of guy who personally reacts -- he doesn't want to do bad things -- and being charged with something wrong was personally affecting him so much, that it seemed to me that he made the right decision to go ahead and get the thing over with so that he could start living a constructive life again. But it was a very limited plea of guilty.

Q. You say he could have won it if he had fought it?

A. That was my opinion, yes.

Q. That's your opinion as to the charge he plead guilty to?

A. That's correct.

While Mr. Burns in his testimony makes light of the substance of the evidence of illegal activity available against Respondent his observations are considerably weakened by Respondent's plea of guilty to the charges in the indictment. Moreover Mr. Burns in his testimony provides no factual explanation to support his statements (Tr. 267-283). A similar sparsity is present in the material submitted from the pre-sentencing report of the probation officer who investigated Respondent. It was concluded in that report that Respondent's unlawful activity exhibited nothing more than "a lack of good judgment and poor discretion" (Tr. 362-363). I have closely reviewed the testimony and exhibits relied upon by Respondent and I find and conclude that there is insufficient evidence to support a determination that extenuating or mitigating circumstances pertaining to Respondent's violations of the Act have been shown.

II. The evidence of rehabilitation fails to establish that Respondent has rehabilitated himself since his violations of the Act.

The Commission has ruled in the case of In re Jack W. Savage, CFTC Docket No. 76-1, COMM. FUT. L. REP. (CCH) ¶ 20,139 at 20,922 (Comm. Opinion and Order, March 1, 1976) that "Evidence introduced by [a Respondent] might include a showing * * * that his actions and his social and business conduct subsequent to the infractions evidence his rehabilitation, integrity and good character in the community and his fitness for registration." Regarding the issue of rehabilitation Respondent relies upon evidence showing cooperation with prosecuting authorities, a full disclosure to the Commission when he applied for renewal of his registration as a floor broker and his work in the New York State Attorney General's Office (Resp. Brief, p. 49).

5. Respondent's full cooperation with the criminal prosecuting authorities as reflected in this record (Tr. 117-140, 354-357; Resp. Ex. 1) is, to be sure, strong evidence in his favor. It is apparent, however, that Respondent offered his cooperation only after he became aware of the criminal investigation and even then made no effort to assist the Commodity Futures Trading Commission in its enforcement of the Act or the New York Cotton Exchange in complying with its obligations to enforce its own rules by coming forward with offers of cooperation (Tr. 365, 381, 383, 389). The failure by Respondent to promptly come forward and volunteer full assistance to the Commission and the Exchange (Tr. 389, 392-393) weighs heavily against him in the evaluation of his claim

of rehabilitation. When Respondent renewed his registration as a floor broker in 1978 he filed documents showing his criminal involvement at that time (Tr. 364). Such disclosure was required under Sections 4e and 4f(1) of the Act, 7 U.S.C. §§6e and 6f (1), and Section 1.10a(a) of the Commission's regulations, 17 C.F.R. §1.10a(a). Respondent, at the time of his application for renewal of his registration, knew the Commission's staff was aware of his activities (Tr. 381). The public service work by Respondent since his violations also cannot be assigned significant weight. This work was required by the United States District Court as an alternative to a jail sentence for the felony conviction (Tr. 146-150, 246-250, 357). Respondent must receive credit for the circumstances that he has accepted his assignments in this work with enthusiasm and has made positive contributions to the work of the State Attorney General's Office (Tr. 255-256). While effective public service work is a positive activity for Respondent, I am convinced that a determination herein that Respondent has demonstrated his rehabilitation is premature.

6. Respondent relies upon the testimony of a number of witnesses who had experience with futures trading as establishing his good character, high reputation and special competence in the futures industry (Resp. Brief, p. 49). I have carefully reviewed and considered the testimony of these witnesses. Generally these witnesses based their testimony concerning Respondent upon knowledge gained prior to 1975 and expressed confidence in Respondent's integrity and capability as a floor broker (Tr. 68, 72-73, 82, 96, 101, 103-104, 158, 160-161, 174, 176, 191, 193-194, 219-220, 230-231, 232-233, 299-303, 332, 333-334, 422, 423-424). Some of the witnesses were unaware, prior to the hearing, of an important event in Respondent's futures trading history, i.e., that sanctions had been applied against him in 1970 for trading after hours on an Exchange in violation of the Exchange's rules and the Commodity Exchange Act (Tr. 78, 93, 234-235, 329-330, 336). I recognize that considerable weight and deference is due to the testimony of these witnesses, however, their general observations and opinions concerning Respondent do not convince me that a finding of rehabilitation is warranted. I find and conclude that the evidence of record fails to show Respondent's rehabilitation since Respondent's violations of the Act.

III. The violations by Respondent warrant sanctions provided by the Act and the sanctions should be designed to effectuate the purposes of the Act.

7. The complaint requests as sanctions in this proceeding that an order be issued (1) revoking the registration of the Respondent, (2) assessing a civil penalty of not more than $100,000.00 for each violation of the Act, (3) requiring Respondent to cease and desist the activities found to be in violation of the Act, and (4) barring Respondent from trading on or subject to the rules of any contract market and requiring all contract markets to refuse trading privileges to Respondent.

8. Respondent's manipulation of futures prices and fictitious sales of futures contracts are among the most serious and destructive practices outlawed by the Act. Such conduct is antithetical to the price discovery and price information functions of the futures markets. The "transactions and prices" on commodity futures markets "are susceptible to speculation, manipulation, and control * * *." Section 3 of the Act, 7 U.S.C. §5. The commodity futures markets are "extremely sensitive" and "[a]t best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities of manipulation to the advantage of the shrewd and unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims" 80 Cong. Rec. 6164 (April 27, 1936). See also, 80 Cong. Rec. 7857-7858 (May 25, 1936). Manipulations and controlled prices for profit "exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market." Chicago Board of Trade v. Olsen, 262 U.S. 1, 39 (1923). See also, Bartlett Frazier Co. v. Hyde, 65 F.2d 350, 354 (7th Cir. 1933), certiorari denied, 290 U.S. 654.

9. As stated in the July 13, 1979 Decision and Order, p. 16, the Division of Enforcement by proving that Respondent was convicted of a felony in Federal Court and engaged in the practices of price manipulation of crude oil futures contracts and fictitious sales of crude oil futures contracts -- practices prohibited by Sections 4c(a) and 9(b) of the Act -- established a prima facie case of Respondent's unfitness for registration as a floor broker and a basis for the application of other sanctions against Respondent. I find and conclude that there is insufficient evidence of mitigation and rehabilitation of the Respondent in this case and that Respondent is unfit to remain registered as a floor broker. I also find and conclude that the record supports the imposition of sanctions provided in the Act.

10. The complaint states that a determination should be made as to whether Respondent's registration should be revoked if the allegations of the complaint are found to be true and such a sanction is otherwise warranted (Comp. p. 3). The complaint in this case is silent as to the imposition of a suspension of Respondent's registration. The Act authorizes either a suspension or revocation for unlawful activities such as manipulation and fictitious sales. Section 6(b), 7 U.S.C. §9. The Commission in setting forth in the complaint that an Order revoking Respondent's registration may be entered must have intended to say that a sanction as severe as revocation may be imposed or corrective action of a lesser degree may be directed if warranted. I find and conclude that a suspension for six (6) months is reasonable in this case and effectuates the remedial purposes of the Act. Administrative sanctions are not designed as punishment or retribution but rather as a means of obtaining compliance in the future with applicable requirements. A suspension of six (6) months and the other sanctions applied herein will suffice to caution Respondent and others that the Commission will not condone actions which are subversive of the Act and regulations. The Order issued herein shall direct that Respondent's registration as a floor broker be suspended for a period of six (6) months.

11. Section 6(b) of the Act, 7 U.S.C. §9, authorizes as a sanction, upon a determination that a person registered with the Commission has violated the Act, an assessment against "such person [of] a civil penalty of not more than $100,000.00 for each such violation." Section 6(d) of the Act, 7 U.S.C. §9a, further provides that:

> In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market -- the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market -- the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation.

Respondent's primary business involves the use of commodity futures markets (Tr. 346, 347-349). Witnesses from a number of commodity brokerage firms testified concerning present and prior business dealings between their firms and Respondent (Tr. 71-73, 83, 93, 102, 158-159, 174-175, 192-193, 198, 219, 231-232, 300, 422-423). Prior to Respondent's conviction and during the past several years, Respondent's annual salary from Pressner Trading Corp., which was based in part upon the profits of the firm, has been in the low six figures (Tr. 363). During the first seven months of 1979 Respondent drew a $200.00 salary each week (Tr. 364). Respondent has net assets of over $1,000,000.00 (Tr. 52, 408-416, 418). Applying the criteria stated in Section 6(d) of the Act, supra, in the case of a person whose primary business involves the use of the commodity futures market, I recognize that Respondent's futures market business is of substantial size and has generated for Respondent a sizeable annual income, that he will be unable to continue in the business for a specified period of time if the provisions of the Order issued in this case become final, however, the amount of money assessed herein considered independently would not preclude continuation of business, and the violations of the Act are of a serious and intensely important nature. Based upon my review of these matters, it is determined that a civil penalty in the amount of $100,000.00 for each of the two violations alleged in the amended complaint and proven in this case should be assessed against Respondent.

12. The Order shall further provide that Respondent shall cease and desist the violations involved in this case. Respondent shall also be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final.

13. All proposed findings and conclusions and contentions presented by the parties for the record have been considered. Not all of these proposed findings and conclusions and contentions have been specifically mentioned. Any such matters inconsistent with this Initial Decision and Order are found and concluded to be without merit.

Based upon the foregoing Findings of Fact and Conclusions of Law, I issue the following:

Order

1. The registration of Respondent, Stephen M. Sundheimer, as a floor broker is hereby suspended for a period of six (6) months from the date on which this Order becomes final.

2. Respondent, Stephen M. Sundheimer, is directed to cease and desist any manipulation or attempt to manipulate commodity futures prices or fictitious sales or attempted fictitious sales of commodity futures contracts on or subject to the rules of any contract market.

3. Respondent, Stephen M. Sundheimer, is prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final. All contract markets shall refuse all trading privileges to the Respondent until the expiration of the twenty-four (24) month period. Such prohibition and refusal shall apply to all trading done and positions held directly by the Respondent, either for his own account or as the agent or representative of any other person or firm, and to all trading done and positions held indirectly through persons or firms owned or controlled by the Respondent, or otherwise.

4. Respondent, Stephen M. Sundheimer, is assessed and shall pay to the Commission thirty (30) days after this Order becomes final a civil penalty in the amount of $100,000.00 for each of the two violations of the Act for a total civil penalty in the amount of $200,000.00.

5. The relief requested that Respondent Stephen M. Sundheimer's registration as a floor broker be revoked is hereby denied. In all other respects, the amended complaint is sustained. Pursuant to the Commission's Rules of Practice, this Order shall become final thirty (30) days after service thereof on all parties to this proceeding.

6. A copy of this Initial Decision and Order shall be served upon each of the parties and on each contract market.

Robert E Duncan
Robert E. Duncan
Administrative Law Judge

Dated: February 15, 1980
Washington, D. C.

APPENDIX D

CFTC
OFFICE OF
HEARING CLERK

COMMODITY FUTURES TRADING COMMISSION 13 3 25 PM '79

2033 K Street, N.W., Washington, D.C. 20581

. . . . . .

In the Matter of: :

STEPHEN M. SUNDHEIMER, : CFTC Docket No. 79-22

Respondent :

. . . . . .

VINCENT L. MORGAN, Esquire
DONALD R. LEVINE, Esquire
Division of Enforcement
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D. C. 20581
For the Division of Enforcement

PAUL J. CURRAN, Esquire
VINCENT J. SYRACUSE, Esquire
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022
For the Respondent

Before: ROBERT E. DUNCAN
Administrative Law Judge

DECISION AND ORDER
GRANTING, IN PART, SUMMARY DISPOSITION

Statement of the Case

This is an administrative proceeding brought against Respondent, Stephen M. Sundheimer, a registered floor broker. On January 16, 1979, a copy of the Commission's Complaint and Notice of Hearing, pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq. ("Act"), was forwarded to Respondent. Respondent, by counsel, filed an answer to the complaint on February 5, 1979. On March 15, 1979, an Order was entered granting a motion to amend the complaint in certain respects and on March 19, 1979, Respondent filed an answer to the amended complaint. A motion for summary disposition by the Division of Enforcement was filed on February 26, 1979. A response in opposition to the motion for summary disposition was filed on behalf of Respondent on March 26, 1979. Oral argument on the motion was held on May 25, 1979. At the conclusion of the oral argument the parties were advised that the motion for summary disposition would be granted, in part, and denied, in part, and that findings of fact, conclusions of law and an order would be issued concerning the motion. It was further provided that an evidentiary hearing would be convened on July 9 and 10, 1979, rescheduled to July 25, July 26 and July 27, 1979, on the issues remaining in the proceeding touching upon any mitigation and rehabilitation and sanctions, if any, to be applied, such issues being considered inappropriate for resolution pursuant to the motion for summary disposition (Tr. 40-A, 41). */

Issues Presented for Summary Disposition

The issues considered here and which are deemed suitable for findings of fact and conclusions of law and order on the motion for summary disposition are the following (Tr. 40-A):

I. Whether sufficient showing has been made by the Division of Enforcement -- in the absence of rebutting evidence of mitigation, rehabilitation or the inappropriateness of any sanction -- that Respondent,

---

*/ The record references, i.e., "Tr." followed by a number or numbers, are to the pages of the transcript of the oral argument presented by the parties on May 25, 1979.

because of his conviction of a felony and his activities involving manipulation of futures prices and fictitious sales of futures contracts, is unfit to remain registered as a floor broker and may be subject to other sanctions under the Act; and

II. Whether Respondent's activities involving manipulation of futures prices and fictitious sales of futures contracts all occurred prior to the effective date of the 1974 amendment to the Act and are thus outside the reach of the Commission's jurisdiction; and

III. Whether Respondent's activities insofar as they involve manipulation of futures prices in violation of Section 9(b) of the Act afford a basis for the Division of Enforcement to seek imposition of administrative sanctions.

Based upon the entire record, including the amended complaint, answer to the amended complaint, motion for summary disposition and exhibits thereto, response in opposition to the motion and exhibits and attachments thereto, and the oral argument submitted by the parties on May 25, 1979, I make the following findings of fact, conclusions of law and order:

Findings of Fact and Conclusions of Law

1. The parties appear to agree, at least with respect to the matters which are to be considered here, that there are no contested genuine issues of material fact. What is disputed are essentially legal questions and the proper interpretation to be placed upon the material facts. I find and conclude, with respect to the issues under consideration, that there is no genuine issue as to any material fact, that there is no necessity that further facts concerning these issues be developed

in the record, and that the Division of Enforcement is entitled to a decision in its favor on such issues as a matter of law.

2. It is averred, in the amended complaint, that Respondent, a registered floor broker, is unfit to remain registered in that, as paragraph 2 of Count I of the amended complaint states, he has been convicted of a felony violation. It is specifically stated that (Comp. p. 1):

> On or about January 9, 1978, [Respondent] was convicted of knowingly aiding, assisting, counseling, and advising the preparation of returns, affidavits, claims and other documents with respect to the internal revenue laws which were false and fraudulent as to material matters, a felony, in violation of Title 26, United States Code, Section 7206(2).

In Count II of the amended complaint, it is averred that Respondent violated Section 9(b) of the Act, 7 U.S.C. §13(b), in that he attempted to and did manipulate the prices for futures contracts. It is specifically stated that (Comp. p. 2):

> From about September 1974 to about October 1976, [Respondent] violated, or aided and abetted violations of, Section 9(b) of the Act, 7 U.S.C. §13(b), in that [Respondent], singly and in concert, directly and indirectly, attempted to manipulate and did manipulate prices of crude oil futures traded on the Petroleum Associates of the New York Cotton Exchange, Inc. in order to create predetermined losses and gains in commodity futures accounts.

It is further averred in Count II of the amended Complaint that Respondent violated Section 4c(a) of the Act, 7 U.S.C. §6c(a), by engaging in transactions which were fictitious sales of futures contracts. It is specifically alleged that (Comp. p. 2):

> From about September 1974 to about October 1976, [Respondent] violated, or aided and abetted violations of, Section 4c(a) of the

> Act, 7 U.S.C. §6c(a), in that [Respondent], singly and in concert, directly and indirectly, offered to enter into, entered into, or confirmed the execution of transactions involving crude oil futures traded on the Petroleum Associates of the New York Cotton Exchange, Inc. which transactions were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales, or which were used to cause prices to be reported, registered, or recorded which were not true and bona fide prices, in order to create predetermined losses and gains in commodity futures accounts.

3. The amended complaint provides for the institution of a public proceeding to establish the truth of the allegations and, if found to be true, to determine whether sanctions should be applied in accordance with the terms of the Act. The sanctions proposed are (A) revocation of Respondent's registration, (B) imposition of an order directing Respondent to cease and desist from further violations of Sections 4c(a) and 9(b) of the Act, (C) prohibition of any trading in connection with any contract market by Respondent and the direction to all contract markets to refuse Respondent trading privileges and (D) assessment of a civil penalty of not more than $100,000.00 for each violation of the Act.

4. Respondent in his answer to the amended complaint admits that he is registered as a floor broker and admits that (Ans. p. 1):

> [O]n October 27, 1978 [Respondent] waived indictment and pleaded guilty to an Information which charged a violation of Title 26, United States Code, §7206(2) and further admits that he was sentenced on January 9, 1979.

The remaining allegations of the amended complaint are denied. Certain affirmative defenses are set forth in the answer. First, it is stated that representatives of the Commodity Futures Trading Commission in April 1976 "examined the records

of Pressner Trading Corp. ("Pressner") with which [Respondent] is affiliated and attained full knowledge of the involvement of Pressner and Mr. Sundheimer in the trading of crude oil futures on the Petroleum Associates of the New York Cotton Exchange, Inc. Thereafter [the Commission's staff] monitored the trading of crude oil futures and, upon information and belief, [the Commission's staff] assisted state and federal prosecutors in connection with their investigation of crude oil futures and alleged use of prearranged trades and necessarily learned of [Respondent's] involvement" (Ans. p. 2). The Division of Enforcement, it is stated in the answer, notwithstanding its knowledge of Respondent's activities, failed to take any action to have administrative sanctions applied to Respondent until the instant proceeding which was filed on January 16, 1979. Prior to the time Respondent's registration as a floor broker was to expire, an application for renewal was submitted "which specifically disclosed the guilty plea and annexed a copy of the plea transcript" (Ans., p. 4). The Respondent's application for renewal was granted and the Commission necessarily has determined that Respondent is fit to engage in business and no good cause exists to deprive Respondent of his registration. Second, it is stated that the activities referred to in the complaint occurred prior to April 21, 1975, the effective date of the 1974 amendment to the Act and before the trading of crude oil futures contracts was made subject to the provisions of the Act, and, third, while price manipulation of futures contracts is prohibited by Section 9(b) of the Act, administrative sanctions are not authorized for violations of Section 9(b) because that Section by its terms provides only for criminal penalties for a violation thereof.

5. Attached as an exhibit to the Division of Enforcement's motion for summary disposition is a copy of the one-count Information filed with the United States District Court for the Southern District of New York on October 27, 1978. The Information charges that from September 1974 until on or about July 19, 1976 (Motion, Ex. II):

> In furtherance of the offense charged in this Information, the defendant STEPHEN M. SUNDHEIMER (on behalf of Pressner Trading Corporation, of which at all times relevant to this Information he was vice-president), together with other persons, fixed, rigged and

> fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years. As the defendant STEPHEN M. SUNDHEIMER well knew, the aforesaid fraudulent losses were to be claimed on the United States corporation income tax returns of the oil company. And in fact, the aforesaid fraudulent losses attributed to the oil company, C. R. Rittenberry & Associates, Inc., were claimed on the consolidated United States corporation income tax returns filed on behalf of the oil company and other companies affiliated with it, by the oil company's parent, the Deutsche Corporation, for the fiscal years ending October 31, 1974 and October 31, 1975.
>
> (Title 26, United States Code, Section 7206(2)).

6. Attached as an exhibit to the Division of Enforcement's motion for summary disposition is a copy of the transcript of the proceeding before the United States District Court on October 27, 1978, in which the Court explained the charges to Respondent and Respondent entered a plea of guilty to the Information. At that hearing the following transpired (Motion, Ex. III, pp. 4, 9-11):

> BY THE COURT:
>
> Q. Mr. Sundheimer, you are charged in this information with a violation of Section 7206(2) of Title 26. Basically the charges are that you unlawfully, knowingly and wilfully assisted in the preparation of

documents which were fraudulent and false with respect to matters arising under the Internal Revenue laws.

The information charges that you, as vice president of Pressner Trading Corporation, together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the crude oil market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following years.

The information charges that you knew that these fraudulent losses were to be claimed on the tax returns of the oil company, Rittenberry, and it further charges that they were in fact claimed.

Do you understand those charges?

A. (By the defendant) Yes, I do, your Honor.

* * *

Q. Mr. Sundheimer, I want you, in your own words, to tell me just what it is that you did that is the foundation for your decision to plead guilty to the information.

A. Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.

I gave my consent to that arrangement and I was present when it was made.

Q. And your consent was necessary to the making of that arrangement?

A. Yes, it was, your Honor.

Q. And did you understand that the purpose of that arrangement was to enable the oil company to take certain tax losses on its corporate tax return?

A. Yes, I did, your Honor.

Q. And did you also then give your consent to a similar arrangement for the following year?

A. I think that it was implicit in the initial understanding. There was no additional consent required.

Q. Are you in good health today, Mr. Sundheimer?

A. I hope so.

THE COURT: Very well, gentlemen. I shall accept the plea.

THE CLERK: Are you Stephen Sundheimer?

THE DEFENDANT: Yes sir.

THE CLERK: On an information filed this day, October 27, 1978, how do you plead to this information?

THE DEFENDANT: I plead guilty, sir.

7. On January 9, 1979, the United States District Court for the Southern District Court of New York entered a Judgment and Probation/Commitment Order in the criminal case

against Respondent. The Judgment (Motion, Ex. I) provides that there was a plea of guilty by Respondent "and the court being satisfied that there is a factual basis for the plea, * * * [the] finding & judgment [is that Respondent] has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly aid[ing], assist[ing] and advis[ing] in the preparation of false and fraudulent income tax returns (Title 26, U. S. Code, Section 7206(2))." Respondent was sentenced to imprisonment for a period of one year and fined $5,000.00 plus cost of prosecution. Execution of the sentence of imprisonment was suspended and Respondent was placed on probation for one year with a special condition that Respondent devote one year, on a full time basis, to some community activity. The Court subsequently approved, as a special condition of probation, service by Respondent on a full time basis without pay, as a technical assistant with the Bureau of Environmental Protection of the New York State Attorney General's Office. It is conceded by Respondent in his opposition to the motion for summary disposition (Response, p. 2), that "Mr. Sundheimer admits that he has been convicted on a guilty plea to a felony * * *" and that the "conviction was rooted in certain facts which were admitted when Mr. Sundheimer pleaded guilty * * *."

I. The Division of Enforcement has sufficiently shown-- in the absence of any dispositive, rebutting evidence establishing mitigation, rehabilitation or inappropriateness of any sanction -- that Respondent because of his conviction of a felony and his admitted manipulation of futures contract prices and his admitted fictitious sales of futures contracts is unfit to remain registered as a floor broker.

8. It is established by the admissions and exhibits submitted by the parties and I so find and conclude that on January 9, 1979, Respondent was convicted of a felony in Federal court. It is further established and I so find and conclude that Respondent admitted to having acted with others between September 1974 and July 19, 1976, in "fix[ing], rigg[ing] and fraudulently prearrang[ing] trades and manipulat[ing] the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined

losses" as charged in the criminal Information, supra, paragraph No. 5. Further I adopt as findings and conclusions in this case the allegations contained in the Information. Section 4c(a) of the Act, 7 U.S.C. §6c(a), provides, in part:

> It shall be unlawful for any person to offer to enter into, enter into or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--
>
> (A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale;
>
> * * *

The Judicial Officer in the United States Department of Agriculture decision, In re Jean Goldwurm, et al., 7 Agr. Dec. 265, 275-276 (1948) ruled that:

> Section 4c of the act does not stop at the prohibition of 'wash sales.' It also prohibits any transaction that is of the character of a wash sale, is commonly understood to the trade as a wash sale, or is a fictitious sale. The language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading on the basis of supply and demand factors and trading opinion of these factors. [emphasis in original].

The legislative history of the Commodity Exchange Act shows that Congress intended that the transactions relating to a futures contract market be responsive to the economic forces exerted by the market such as supply and demand rather than the dictates of one or a few traders. During the Congressional debates in 1936 on the bill which amended the Grain Futures Act and renamed the act to the Commodity Exchange Act, it was stated (80 Cong. Rec. 6164 (1936)):

> There is a widespread public interest attached to the business of future trading. The very nature of the business is such as to make it fraught with temptation for those who are disposed to take unfair advantage. In no other business is there found the same combination of circumstances and profit possibilities to tempt the unscrupulous.
>
> It is the purpose of this bill to reduce to a minimum the possibility of unscrupulous trading and to permit the benefits of such trading to be obtained by those entitled to them.
>
> There can be no defense for such fraudulent practices as have been pointed out in transactions in these grain exchanges. The present law does not reach them. These markets are extremely sensitive. A false or misleading statement or fictitious trading may in a few minutes turn thousands of dollars into the pocket of some unscrupulous trader, * * *. At the same time it may cause millions of dollars in loss to farmers and others affected by a fictitious price movement. Large speculators may temporarily upset the whole price structure.
>
> * * *
>
> At best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities

> of manipulation to the advantage of the shrewd and unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims.

"The purpose and object of the whole bill is to give a free, open market * * *" [emphasis supplied] (80 Cong. Rec. 7932 (1936)). Section 9(b) of the Act, 7 U.S.C. §13(b), states:

> It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce * * *.

In the case of Cargill, Incorporated v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U. S. 932 (1972), the Court held:

> We think the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.

The Commission ruled in the case of In Re Hohenberg Bros. Company and Julien J. Hohenberg, CFTC Docket No. 75-4, COMM. FUT. L. REP. (CCH) ¶ 20,271 at 21,477 (Commission Decision and Order, February 18, 1977) that:

> [M]anipulation has been defined generally as conduct intentionally engaged in resulting in an artificial price, i.e., a price that does not reflect the basic forces of supply and demand.
>
> A finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity (as determined by the forces of supply and demand) and as a result of such conduct or course of action an artificial price was created.

Respondent is an experienced floor broker who has been trading in commodity futures on the Exchanges since 1968 (Sentencing Memorandum on Behalf of Defendant Stephen M. Sundheimer, p. 4). In stipulating to the statements contained in the Information, Respondent clearly established and I so find and conclude that he intentionally and wilfully engaged in fictitious sales and price manipulation of futures contracts which resulted in artificial prices. I find and conclude on the basis of the uncontroverted facts that the Division of Enforcement has sufficiently established, except that there is no evidence that the violations occurred after July 19, 1976, the averments of paragraph 2 of Count I and paragraphs 4 and 5 of Count II of the amended complaint.

9. It is contended by the Division of Enforcement that the criminal conviction constitutes estoppel as to the matters determined by the judgment in the criminal case. In a recent decision relied upon by the Division of Enforcement, the Supreme Court held that under the "contemporary law of collateral estoppel," trial courts have "broad discretion" to determine whether offensive collateral estoppel should be applied in a particular case. Offensive collateral estoppel in this context "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another

party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." Parklane Hosiery Co., Inc. v. Shore, ____ U. S. ____, 99 S. Ct. 645, 649 fn. 4, 651-652 (1979). Offensive collateral estoppel may be invoked against a party if no unfair burden would be imposed upon the party and that party "received a 'full and fair' opportunity to litigate" his claims in the prior proceeding, Id., 99 S. Ct. at 652. Respondent contends that any collateral estoppel pertaining to his conviction is limited to his crime and his "crime was that he aided and abetted the filing of a false tax return in 1974 and in admitting his guilt he did not admit to all of the matters charged in the information" (Response to Motion, pp. 30-31). The record, however, does not support this contention. At the hearing before the District Court on October 27, 1978, Respondent without reservation pleaded guilty to all the facts charged in the Information, supra at paragraph 6. Respondent correctly argues that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U. S. 558, 568-569 (1951). Where there is a guilty plea the truth of the averments in the information is admitted, United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Judge Holloway, concurring in the result). I find and conclude that Respondent's judgment of conviction based upon his guilty plea and his statements concerning his participation in the arrangement which constitute the factual basis for the guilty plea is substantive evidence of his violations of the prohibitions against fictitious sales of commodity futures contracts and the manipulation of the prices of commodity futures contracts. I further find and conclude that Respondent is collaterally estopped from contesting the factual allegations set forth in the Information filed in the criminal case.

10. Section 8a(3) of the Act, 7 U.S.C. §12a(3), provides that the Commission is authorized to suspend or revoke the registration of any person registered under the Act:

> * * * if cause exists under [Section 8a](2)(B) or (C) which would warrant a refusal of registration of such person * * *.

Section 8a(2)(B) of the Act, 7 U.S.C. §12a(2)(B), provides that the Commission is authorized to refuse to register any person:

> (B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant * * * at any time engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal court * * * (ii) for other good cause shown;
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> * * *

The purpose of this Section is to provide a means whereby the Commission can "'bar from this occupation those persons who by their past actions have demonstrated that they cannot be entrusted with customers' trades and funds' (H. R. Rep. No. 93-975, 93d Cong., 2nd Sess. 78 (1974))." Division of Enforcement v. Alan H. Rodin, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,114 at 20,815 (ALJ Decision affirmed, Feb. 3, 1976). "The plain words of §8a(2)(B)(i) of the Act reflect a Congressional judgment that proof of a felony conviction, without more, will establish a prima facie case of an applicant's unfitness." Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977). By proving that Respondent was convicted of a felony in Federal court and engaged in the practices of price manipulation of crude oil futures contracts and fictitious sales of crude oil futures contracts--practices prohibited by Sections 4c(a) and 9(b) of the Act--the Division of Enforcement established a prima facie case of unfitness of the Respondent for registration as a floor broker and a basis for the application of other sanctions against Respondent.

11. It is contended by Respondent that because of the awareness of the Commission's staff of Respondent's activities prior to his plea of guilty to the indictment on October 27, 1978,

and the Commission's action in granting Respondent's application for renewal of registration, the Division of Enforcement is estopped and is not entitled to bring or maintain this proceeding. Clearly, however, the Division of Enforcement cannot be faulted for waiting until after disposition of the criminal case before seeking to invoke the provisions of the Act. If a judgment of not guilty had been rendered in the criminal proceeding, the instant proceeding would necessarily have been quite different. This proceeding was instituted on January 16, 1979, promptly after Respondent's conviction on January 9, 1979. And, of course, one of the grounds or reasons for this proceeding, the felony conviction, did not exist prior to January 9, 1979. As to Respondent's activities concerning the manipulation of futures contract prices on the exchange and fictitious sales, the terms of the Act are dispositive of Respondent's contention. Under Section 8a of the Act, 7 U.S.C. §12a, the Commission has the choice, on the one hand, of renewing the registration of a person and subsequently commencing a proceeding to revoke or suspend such registration for violations of the Act and to impose other sanctions or, on the other hand, refusing to renew a registration pending institution and completion of an administrative proceeding to determine whether the applicant is fit for registration and whether other sanctions should be applied. The Commission in authorizing the commencement of this proceeding after having renewed Respondent's application for registration has acted in accord with the provisions of the Act. No unfairness or improper treatment of Respondent is apparent. Generally estoppel cannot be used as a defense against an enforcement proceeding by a Federal agency, United States Immigration and Naturalization Service v. Hibi, 414 U. S. 5, 8 (1973); Wallace Corp. v. National Labor Relations Board, 323 U. S. 248, 253 (1944). The defense of estoppel has been rejected by courts in cases under the Commodity Exchange Act. Nelson v. Secretary of Agriculture, 133 F.2d 453, 455 (7th Cir. 1943); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961). In the case of In re Jeffrey L. Silverman, CFTC Docket No. 76-18, [1977] COMM. FUT. L. REP. (CCH) ¶ 20,410 at 21,641 (Commission Decision March 14, 1977), affirmed, 562 F.2d 432 (7th Cir. 1977), Respondent, in a prior proceeding, had been found to have violated the Commodity Exchange Act. While the prior proceeding was pending before an Administrative Law Judge, the 1974 amendment to the Act became effective and:

> required for the first time under Section 4k, 7 U.S.C. §6k (Supp. V, 1975), that associated persons of futures commission merchants, such as respondent, be registered with the Commission to continue to act in that capacity. Respondent filed an application for registration as an associated person, which indicated the existence of the then pending proceeding against him. Because no final decision had been rendered against respondent at the time he filed his application, however, registration was granted. Id. at 21,642.

The Commission ruled that the violations established in the prior proceeding warranted the subsequent revocation of the associated person's registration. Ibid. Although the Commission and the Court of Appeals did not expressly say that the registration (and subsequent renewal of registration, see 562 F.2d at 434) which occurred while the Commission was aware of allegations against the applicant raised no bar of estoppel in the later proceeding to revoke his registration, the disposition of that case by the Commission and the Court of Appeals furnishes strong support for the determination herein that the grant of an application for registration will not preclude a later proceeding to determine whether the registration should be revoked and other sanctions should be applied. "[T]he premises implicit" in a decision "are as authoritative" as the holding, Murray v. Roberts, 103 F.2d 889, 894 (2d Cir. 1939), per Judge Learned Hand, petition for certiorari dismissed pursuant to stipulation, 311 U. S. 720 (1941). See also Fouts v. Maryland Casualty Co., 30 F.2d 357, 359 (4th Cir. 1929), certiorari denied, 279 U. S. 852. Respondent has conceded that at all relevant times, he was aware that the Commission and its staff would insist upon the application of the provisions of the Act. This circumstance was reported to the District Court prior to Respondent's sentencing on January 9, 1979 (Sentencing Memorandum on Behalf of Defendant Stephen M. Sundheimer, p. 9). There is no basis here for the application of estoppel, laches or a finding of an abuse of discretion and these contentions must be rejected.

II. The price manipulation and fictitious sales transactions underlying the felony conviction admittedly extended to July 19, 1976, and such transactions were within the Commission's jurisdiction.

12. It is contended by Respondent that his activities concerning crude oil futures occurred prior to the time the Commission assumed jurisdiction over this commodity and there is no authority to go forward with this proceeding. Prior to 1975, the Act was enforced by the Commodity Exchange Authority in the United States Department of Agriculture and only specifically enumerated agricultural commodities were within the coverage of the Act, Section 2(a), 7 U.S.C. §2 (1970 ed.). The 1974 amendment extended coverage to "all other goods and articles * * * and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in * * *," Section 2(a)(1) of the Act, 7 U.S.C. §2 (1976 ed.). The 1974 amendment became effective on April 21, 1975, Section 418 Pub. Law 93-463, 88 Stat. 1415, and accordingly the term "commodity," as used in Sections 4c(a) and 9(b) of the Act, 7 U.S.C. §§6c(a) and 13(b), was extended on that date to include crude oil. On April 18, 1975, the Commission entered orders granting provisional designation to the "Petroleum Associates of the New York Cotton Exchange, Inc., as a contract market for crude oil and liquified propane gas," 40 Fed. Reg. 19035 (May 1, 1975). On May 5, 1975, the Commission extended the provisional designation, 40 Fed. Reg. 21769 (May 19, 1975), and on July 18, 1975, the Commission issued an order approving the application of the Petroleum Associates of the New York Cotton Exchange, Inc., as a contract market for crude oil and liquified propane gas," [Transfer Binder 1975-1977 Decisions] COMM. FUT. L. REP. (CCH) ¶ 20,062 at 20,679. It is clear that on the effective date of the 1974 amendments to the Act, i.e., April 21, 1975, the Commission had and was exercising jurisdiction over crude oil futures contracts traded on the Petroleum Associates of the New York Cotton Exchange, Inc.

13. As stated supra, Paragraphs 5-6, Respondent admitted in the criminal case that from September 1974 until July 19, 1976, he, "together with other persons, fixed, rigged and fraudulently prearranged, traded and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses * * *."

Respondent explained to the District Court that under the terms of the arrangement which began in 1974 and was intended to extend at least into the following year, i.e., 1975, Respondent's firm would take "the other side of certain pre-arranged commodity futures contracts in crude oil futures." I find and conclude that the uncontested facts show that the price manipulation and fictitious sales violations extended through 1975 and until July 19, 1976, as stated in the Information, and were within the jurisdiction of the Commission which was effective on April 21, 1975, and conferred by the 1974 amendment to the Act.

III. Section 9(b) of the Act outlaws any price manipulation or attempted price manipulation of any commodity subject to the Act and Sections 6(b), 6(c) and 8a(3) of the Act authorize administrative proceedings seeking corrective action or the application of sanctions for violation of any provision of the Act.

14. Respondent states in his opposition to the motion for summary disposition and in his answer to the amended complaint that the averments in the amended complaint concerning Respondent's attempt to manipulate and manipulation of the prices of crude oil futures contracts in violation of Section 9(b) of the Act should be dismissed because Section 9(b) makes price manipulation a felony but does not authorize the Commission to initiate an administrative proceeding. A consideration of the terms of the Act and the assertions in the amended complaint establishes that Respondent's contentions on this issue cannot be adopted.

15. To be sure, Section 9(b) of the Act, 7 U.S.C. §13(b), declares that any price manipulation or attempted price manipulation shall be a felony punishable by fine or imprisonment and does not in the same section provide for administrative proceedings in the event of such violations. The amended complaint in the instant proceeding states that this matter is brought to determine whether, if the allegations of the complaint are deemed to be true, an order should be entered pursuant to Sections 6(b), 6(c) and 8a(3) of the Act, 7 U.S.C. §§9, 13b and 12a(3). These sections authorize the imposition of sanctions or corrective measures following an

administrative proceeding where facts have been developed establishing that a person, inter alia, "is violating or has violated any of the provisions of this Act * * *" (Sections 6(b) and 6(c), 7 U.S.C. §§9 and 13b) or "at any time engaged in any practice of the character prohibited by this Act * * *" (Section 8a(2)(B), 7 U.S.C. §12a(2)(B), referred to in Section 8a(3), 7 U.S.C. §12a(3)). In the case of Great Western Food Distributors v. Brannan, 201 F.2d 476, 478 (7th Cir. 1953), certiorari denied, 345 U. S. 997, the Court held:

> The order is attacked on several grounds. The first, that the complaint did not charge an offense subject to administrative disciplinary action under Section 6(b) of the Act is, we think, without merit. Section 6(b) provides for disciplinary proceedings if a person is violating or has violated any of the provisions of this chapter * * *. Section 9 makes it unlawful to attempt to manipulate the price of a commodity in interstate commerce; to attempt to corner a commodity in interstate commerce, or to corner any such commodity. The complaint charged petitioners with the very conduct prohibited by this section. There can be no doubt that the averments constituted an offense under Section 6(b) of the act.

I find and conclude that there is no basis to dismiss the averments of the amended complaint which allege that Respondent violated Section 9(b) of the Act and that, in part, by reason of the allegation, Respondent is subject to this proceeding pursuant to Sections 6(b), 6(c) and 8a(3) of the Act.

Based upon the foregoing, I issue the following:

Order

1. The Division of Enforcement's motion for summary disposition of this proceeding should be and is hereby GRANTED, in part, and it is determined that the Division of Enforcement

has established a sufficient showing--in the absence of rebutting evidence of mitigation, rehabilitation or the inappropriateness of any sanction--that Respondent, Stephen M. Sundheimer, because of his conviction of a felony and his activities involving manipulation of futures prices and fictitious sales of futures contracts is unfit to remain registered as a floor broker and may be subject to other sanctions under the Commodity Exchange Act, as amended; and

2. The Respondent's manipulation of futures prices and fictitious sales of futures contracts is determined to have continued after the effective date of the 1974 Amendment to the Commodity Exchange Act and is within the reach of the Commission's jurisdiction; and

3. An administrative proceeding may be maintained and if otherwise appropriate, administrative sanctions may be applied for proven violations of Section 9 of the Commodity Exchange Act, as amended, 7 U.S.C. §13; and

4. To the extent that the Division of Enforcement's motion for summary disposition seeks the imposition of sanctions at this time, the motion should be and is hereby DENIED without prejudice.

5. At the hearing scheduled for July 25, July 26 and July 27, 1979, the parties will be afforded an opportunity to offer evidence on the issues remaining for decision, viz., mitigation, rehabilitation and the appropriateness of the application of any sanction pursuant to the Commodity Exchange Act, as amended.

Robert E Duncan
Robert E. Duncan
Administrative Law Judge

Dated: July 13, 1979
Washington, D. C.